United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4049

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-4049
76-4061
76-4074

ITT WORLD COMMUNICATIONS, INC., et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

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P/S

ON PETITIONS FOR REVIEW OF REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

The petitioners seek review of a Report and Order of the Federal Communications Commission which determined, as a matter of policy to govern future applications for licenses or other instruments of authorization, that a need existed for international "dataphone-type" service, and that applications to provide service to meet that need would be accepted from the American Telephone & Telegraph Company and from the international record communications common carriers, including the petitioners.

The order contemplated that AT&T could provide "basic" dataphone service without modification of or addition to its facilities, and that removal of a restriction on use of AT&T's international voice network would enable AT&T to meet a part of the demonstrated need for service. The order left undetermined the precise nature of the dataphone-type services to be provided by the international record carriers (IRCs), pending resolution of integral questions about interconnection between the IRCs and domestic telephone companies. The order neither granted nor denied applications for licenses, certifications, or other instruments of authorization by any carrier. Inquiry into Policy to be Followed in Future Authorization of Overseas Dataphone Service (Docket No. 19558), 57 FCC 2d 705 (1976) (J.A. 1-9). This Court has jurisdiction, insofar as the report and order constitutes final agency action, by virtue of 47 U.S.C. §402(a) and 28 U.S.C. §2342(1), and venue by virtue of 28 U.S.C. §2343.

STATEMENT OF QUESTION PRESENTED

Whether the Commission acted arbitrarily or capriciously in deciding, as a matter of policy to govern future applications, that restrictions on use of the public telephone network should be removed to permit AT&T to provide overseas dataphone-type services in competition with the international record carriers.

COUNTERSTATEMENT OF THE CASE

The petitioners are ITT World Communications, Inc., RCA Global Communications, Inc., and Western Union International, Inc. -- the three dominant international record communications carriers doing business in this country. 1/ They seek to have this Court set aside a Commission policy which would accept AT&T and the IRCs as appropriate carriers for overseas data-phone-type services. 2/ The IRCs do not contest the Commission's finding of a need for overseas dataphone service; their objection is that the Commission did not exclude AT&T from providing that service.

In this counterstatement, we set forth (1) a brief description of the international communications industry and the relevant parts of the statutory scheme for its regulation,

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1/ Record carriers are those whose primary business is the transmission of printed or other hard-copy messages, known as record communications, in contrast to voice communications. The traditional distinction is best illustrated by the difference between telegrams (record) and telephone calls (voice).

2/ The term "dataphone" with a lower-case "d" refers to service whereby a customer with appropriate equipment may send data, facsimile or other hard copy communications by means of an ordinary telephone circuit at regular message rates. This is achievable by means of various devices, such as facsimile scanners or teletypewriters, attached either electrically or acoustically to the voice telephone network. Dataphone service has been available for many years to domestic telephone service subscribers as a permissive use of the voice network. Dataphone with a capital "D" is a registered service mark belonging to AT&T. This case is not concerned with AT&T's registered service mark, but with whether and how generic dataphone service should be extended to overseas routes.

and (2) a summary of the proceedings leading to the Commission's order and subsequent events that bear on the arguments.

I. The Industry and Its Regulation

The Commission has a longstanding general policy of separating voice and record services in international communications. The policy reflects history, technological evolution, 3/ and, to some extent, concern for the survival of the record carriers in direct competition with AT&T. 4/ See AT&T (Alternate voice/nonvoice services), 27 FCC 113, 120-23 (1959), for a review of the policy and the reasons for it. In general, the policy reserves record communications to IRCs and voice communications to AT&T, although "exceptions have always been made when they were found to be in the public

3/ The record carriers came into existence when telegraph cables and high frequency radio were the principal vehicles for overseas communications. They provided record services only, because that is what their technology permitted. Bandwidths were not sufficiently broad for effective voice communications. When AT&T developed the voice-grade submarine cables that still are a significant part of the international system, it operated as the only overseas voice carrier because it had the only adequate facilities. AT&T's continuing role as the only carrier providing overseas message telephone service (MTS) is consistent with its domestic role, where the Commission has preserved interstate message telephone service as a monopoly offering while introducing competition in other areas of the communications industry.

4/ See AT&T (TAT-4), 37 FCC 1151 (1964), in which the Commission refused to allow AT&T to offer private line alternate voice/data service, in part because of concern of the "viability" of the IRCs. 37 FCC at 1159.

interest." 27 FCC at 120. 5/

The IRCs provide the following services as their primary overseas offerings:

1. Public message telegraph service, or ordinary overseas telegrams or cablegrams;

2. Telex service; 6/

3. Leased channel or private line service, which may be record only or alternate voice/data; 7/ and

4. Datel, a switched voice/data service. 8/

5/ For background on the industry structure and policy proposals for the future, see President's Task Force on Communications Policy, Final Report, Chapter 2 (1968); Intragovernmental Committee on International Communications, Report and Recommendations to Senate and House Commerce Committees, Chapter II (1966).

6/ Telex service permits a subscriber to communicate directly from a teleprinter on his own premises to another teleprinter on the premises of the party he wishes to contact. The stations achieve communications through a switching system analogous to a telephone exchange. Service often is provided through interconnection with the Western Union Telegraph Company, the domestic record carrier, which has no corporate ties with petitioner Western Union International. See TRT Telecommunications Corp., 53 FCC 2d 649 (1975), aff'd sub nom. ITT World Communications, Inc. v. FCC, No. 75-4105 and consolidated cases, Second Circuit (decided February 25, 1976)(without opinion).

7/ Alternate voice/data service (AVD) is "the provision of leased channels, each with sufficient bandwidth so that it may be used for voice communication or, with appropriate equipment, alternately for record or voice communication." AT&T (TAT-4), 37 FCC at 1152 n.1.

8/ Datel is offered as a switched service on a toll basis, in connection with telephone company or Western Union facilities. It is the closest current service offering in the overseas market to the dataphone-type services that are the subject matter of this proceeding. Voice use of Datel is restricted to communications necessary to initiate and coordinate data transmissions.

The petitioners in this proceeding, the three dominant IRCs, have approximately 95 per cent of the international record market. Several smaller record carriers -- the largest of them TRT Communications Corp., a subsidiary of United Brands Co. -- divide the rest of the market.

AT&T provides the only ordinary telephone service from the U.S. mainland to overseas points. AT&T (TAT-4), 37 FCC at 1155. It also provides private line voice service as an overseas public offering; private line alternate voice/data service (AVD) to the Defense Department, AT&T (Alternate voice/nonvoice services), supra; and broadcast program transmission service, on a rotating basis with the three major IRCs. On the unique mainland-to-Hawaii route, 9/ AT&T offers all the services that it offers between mainland points, including dataphone service and private line service without restriction to voice. See AT&T (Hawaii dataphone), 38 FCC 1222, 1 FCC 2d 374 (1965).

The traditional distinction between voice and record services has lost much of its technical significance. Identical

9/ Hawaii is unique because even after it achieved statehood it remained classified as an overseas point for purposes of the Communications Act. 47 U.S.C. §222(a)(5), (6), (10). AT&T's services to Hawaii are provided through interconnection with the island facilities of Hawaiian Telephone Company, so that the Hawaii route exceptions to the ban on international record services by telephone companies apply to that company as well as to AT&T.

facilities and technologies now may carry either or both kinds of messages. In addition, the messages no longer lend themselves to ready compartmentalization. 10/ The Commission observed this development as early as 1959:

> [T]he advance of the art and the demands for service ... have first blurred the sharp distinction between the voice and record services and now are threatening to obliterate such distinction completely. The changes are twofold in nature. The first relates to demands for increased channel capacity and facilities to provide for alternate use of the same facility; i.e., for voice use, for the transmission of photographs, and for the high-speed transmission of other recorded information such as digital data. The second relates to the latest advances which involve the use of very broad bands for the simultaneous transmission of all types of information which may be ... converted to basic impulses undistinguishable from each other as to type of communications.

AT&T (Alternate voice/nonvoice service), 27 FCC at 121. 11/ See also, President's Task Force on Communications Policy, Final Report, Chapter 2 at 7-13 (1968).

10/ A prominent example of this is television program service, which transmits both pictures and sound, but does not necessarily result in a "record" copy and does not serve the normal conversational function of voice telephone service. AT&T and the three petitioners provide this service on a rotational basis.

11/ The Commission concluded in that proceeding that, "at least insofar as military requirements are concerned, all the factors which collectively make up the public interest dictate a change in our policy of separation between voice and record communications in transatlantic service." Id. at 122.

The voice-record dichotomy has not been abandoned, however. It remains generally applicable, with exceptions as required or permitted by the public interest.

The international voice and record carriers, like domestic interstate telephone and telegraph companies, are subject to the regulatory scheme of the Communications Act for interstate and foreign common carrier communications. Their service offerings must be set forth in tariffs filed with the FCC, 47 U.S.C. §203; and they must obtain certification from the Commission before building or acquiring new facilities, providing new services by means of restricted facilities, or terminating or curtailing service, 47 U.S.C. §214. Certification will be forthcoming only if the Commission finds that it will serve the public interest, convenience and necessity. Id.

Ordinarily, a carrier which has facilities in place that are capable of providing new services may offer the new services merely by filing a tariff. 47 U.S.C. §203. When the facilities have been restricted, however -- as AT&T's overseas telephone facilities were restricted to voice services -- a carrier may offer service beyond the restriction only after the Commission has certified that removal of the restriction will serve the public interest, convenience or necessity. This is implicit in the Commission's authority under Section 214 to place conditions or restrictions on its authorizations.

47 U.S.C. §214(c). See Press Wireless, Inc. v. FCC, 264 F.2d 372 (D.C. Cir. 1959).

II. The Overseas Dataphone Proceeding

Thousands of people in this country have data or facsimile or teletypewriter equipment which they can attach to the domestic telephone system to transmit information over ordinary voice circuits. This equipment, may be furnished either by the customer or by the telephone company. It permits the relatively small user who has insufficient demand to justify private line circuits to satisfy his need for facsimile or data transmission simply by dialing the number of the party he wants to call and setting his data equipment in motion. 12/

This use of the telephone network does not require discrete lines or special conditioning or equipment. The data or facsimile call travels over the network in the same manner as a telephone call. The customer pays for the call at the same rate he pays for a long-distance call. In effect, this kind of data or facsimile transmission is an optional

12/ The Commission has encouraged the development of a private equipment market independent of the telephone companies to broaden the options available to customers. See, e.g., Interstate and Foreign MTS and WATS (Docket No. 19528), 56 FCC 2d 593 (1975), 58 FCC 2d 736 (1976), review pending sub nom. North Carolina Utilities Commission, AT&T et al. v. FCC, No. 76-1002 and consolidated cases, Fourth Circuit.

use of MTS rather than a discrete communication service offering. See, e.g., Comments of AT&T, pp. 2-6 (J.A. 144-48). See also J.A. 30-34; 79-82; 137-38.

While this use of the domestic MTS network has been available since 1962 pursuant to tariff provisions on file with the Commission, AT&T Tariff FCC No. 263, the tariff confines its availability to calls within the United States mainland and between the mainland and points in Alaska, Canada and Hawaii. Callers who wish to use their dataphone-type equipment for international calls face tariff restrictions which do not permit that use. 13/ As one party to the Commission proceeding put it, "there is no economic message service" for overseas dataphone-type transmissions. (J.A. 78).

Docket No. 19558 was initiated in 1972 at the request of Xerox Corporation, which, in a letter to the Commission, had asked for removal of the restrictions barring data and facsimile transmissions from the overseas switched telephone network. Xerox had pointed out that the domestic telephone network was "increasingly used" for dataphone-type

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13/ As a practical matter, some users of the overseas MTS network undoubtedly send data and facsimile messages despite the tariff restriction. Because the facilities are the same, enforcement of the restriction is virtually impossible without extensive surveillance and detection equipment, which the carriers have not employed. (J.A. 137-38; 151.)

calls, that the restriction on similar use of the overseas network required users to rely upon "significantly more cumbersome procedures utilizing multiple carrier facilities," and that many users did not have sufficient requirements to justify private line AVD service and thus needed a "demand type" service. Xerox urged the Commission to consider, "in light of the increasing use of acoustical coupling for data and facsimile transmitting equipment," whether the current restrictions on use of the overseas telephone "continue to be in the public interest . . . ." Letter to Common Carrier Bureau chief from Xerox Corporation, June 17, 1971 (J.A. 442-44).

After receiving comments from AT&T and the three principal IRCs, the Commission initiated this proceeding to determine

> whether or not dataphone or a similar service should be authorized to new overseas points, and which carrier or carriers should be authorized to provide the service.

Notice of Inquiry, 36 FCC 2d 605, 608 (1972)(J.A. 10, 14.) As it had done in similar circumstances, 14/ the Commission decided that it could best resolve the matter "by adopting

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14/ See, e.g., Specialized Common Carrier Services, 29 FCC 2d 870, 31 FCC 2d 1106 (1971), aff'd sub nom. Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.), cert. denied, 423 U.S. 836 (1975).

policies governing the provision of dataphone service in the context of this inquiry rather than in passing on separate applications by the carriers to provide such service." 36 FCC 2d at 608 (J.A. 14).

The Commission invited comments from interested parties on the demand or need for overseas dataphone-type service, certain technical questions, whether AT&T should provide the service over its existing overseas network, whether the IRCs should provide the service, the relative costs and efficiencies of service by AT&T and the IRCs, the kinds of interconnection the IRCs would need, the effects on revenues from other services, and other relevant matters. 36 FCC 2d 608-09 (J.A. 14-15).

All the parties 15/ except Western Union Telegraph Company agreed that there was an unsatisfied demand for dataphone-type services. 16/ The telephone companies and the equipment industry parties advocated a policy that

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15/ Fifteen parties, including all the affected carriers, Xerox, and other equipment industry representatives, filed comments, and eight parties filed replies. The comments primarily addressed policy matters, although there was some discussion of technical matters -- particularly, whether satellite circuits were suitable for dataphone-type services. The Commission decided that satellite circuits could be used, and that part of its order is not challenged.

16/ Western Union feared that use of the domestic MTS network to originate overseas dataphone calls would cut into its revenues from Telex and Datel service. (J.A. 169-74.)

would authorize both the voice and record carriers to offer the service, with the telephone company removing its overseas tariff restrictions and interconnecting with the IRCs to provide optional sources of service. The IRCs agreed that the telephone companies should interconnect with them to permit the IRCs to meet the service need; but they argued unanimously that AT&T should be kept out of overseas dataphone.

The IRCs based their argument against AT&T primarily upon competitive considerations. They asserted that AT&T's domestic MTS monopoly and its massive marketing operation would virtually guarantee that the telephone company would dominate the overseas dataphone market. This, they argued, not only would expand the AT&T monopoly, but also would threaten the viability of their other services, such as Telex and Datel. 17/ The IRCs also contended that the voice telephone network was not suitable for many dataphone-type services, and that their own proposals offered a more efficient, technically superior service that was capable of tailoring for personalized needs.

The Commission released its decision on January 8, announcing a general policy that can be summarized as follows:

17/ The IRCs relied primarily on the Commission's "TAT-4" decision to support this argument. AT&T (TAT-4), supra, 37 FCC 1151. In that decision, the Commission refused to allow AT&T to provide leased private line AVD service except to the military.

1. There is a substantial unmet need for overseas dataphone-type services, and an offering of such services will serve the public interest. 57 FCC 2d at 707 (J.A. 3).

2. AT&T can meet a substantial part of that need on existing facilities if the tariff restriction on overseas MTS is removed. Removal of the restriction will benefit telephone users without public detriment, will add to the usefulness and flexibility of the public telephone network, and will serve the public interest. 57 FCC 2d at 708-09 (J.A. 5-6).

3. The IRCs, which did not propose the identical service that AT&T proposed but envisioned a more specialized service tailored to the needs of specific customers, should be permitted to expand their switched record service to meet the need and demand for dataphone-type services, and should be permitted to interconnect with the domestic MTS network for this purpose. 57 FCC 2d at 709-10 (J.A. 7).

4. Applications from both AT&T and the IRCs, in accordance with this policy, will be accepted for filing. 57 FCC 2d at 712 (J.A. 9).

The Commission recognized that removal of the restriction in the AT&T tariff could hurt the IRCs. However, it found that the more likely result of its policy would be to serve the needs of the occasional user who had "insufficient

traffic to subscribe to Telex or private line services," and that "a market appears to exist" for all the present and proposed services. In any event, the Commission said, its primary concern was to give the public high quality service at the lowest cost, and it could not artificially restrict beneficial use of the telephone network to impose a "protective umbrella" and assure the IRCs a part of the market free from competition. 57 FCC 2d at 710 (J.A. 8). 18/

Unable to resolve the interconnection problem on the basis of the comments, the Commission urged AT&T and the IRCs to seek agreement through negotiation, and it invited filings from the IRCs detailing their interconnection needs. The Commission undertook to issue appropriate interconnection orders on the basis of the filings, "including any necessary

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18/ The Commission distinguished its TAT-4 decision on several grounds. First, TAT-4 involved "an essentially new service" which AT&T and the IRCs could offer by making essentially the same investment. Here, by contrast, AT&T already provided the service domestically and had the necessary facilities in place to offer it overseas without additional investment, whereas the IRCs would require additional investment in facilities. Second, the IRCs proposed a more specialized service than AT&T, so that there was room for both offerings in a diverse market. Most importantly, the Commission found that this case involves the question whether artificial restraints on the use of the public telephone system should be removed to meet an unsatisfied need, and that its consistent view had been that any beneficial use of that system which was not publicly detrimental should be permitted. That consideration was lacking in TAT-4, which involved private line services. The Commission said its decision in this case did not open record services generally to AT&T. 57 FCC 2d at 708-09 (J.A. 5-6).

conditions to certificates of convenience and necessity." 57 FCC 2d at 711 (J.A. 8-9). The IRCs did not seek reconsideration. ITT Worldom, RCA Globcom and WUI filed petitions for review in this Court.

After the Commission released its order, the IRCs filed petitions and comments making more specific their interconnection requests. AT&T filed a reply. AT&T also filed an application under Section 214 of the Act for modification of its authorization, to permit it to offer overseas dataphone service. ITT, RCA and WUI filed petitions to deny the AT&T application. See Addendum to Petitioners' Briefs. The Commission has not yet acted on the interconnection matter or the AT&T application.

ARGUMENT

The heart of the Commission's decision to remove the ban on use of the overseas telephone network for dataphone service is contained in two brief statements in its report and order. First, in discussing the traditional voice-record dichotomy, the Commission stated:

> [W]e believe the overriding consideration in this inquiry is in meeting an unmet need by giving the added flexibility to the customer to use the international switched message telephone system for both voice and data, similar to their authorized use of the domestic telephone network. Such a use would be privately beneficial without being publicly detrimental, and consistent with our long held view that the public's use

> of the public network should be made as flexible as possible. See Hush-A-Phone v. U.S., 99 U.S. App. D.C. 190, 193, 238 F.2d 266, 269 (1956); Hush-A-Phone v. AT&T, 22 FCC 112, 113-114 (1957)....
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> * * *
>
> Upon reviewing the record of this inquiry, we conclude that it is no longer appropriate to restrict the use of overseas message telephone service to voice-only. Customers with terminal equipment that is being used in conjunction with the domestic MTS network are prohibited from using that same equipment when making overseas calls, despite a need for such service. We find this restriction not in the public interest.

57 FCC 2d at 709 (J.A. 6).

Second, in discussing the IRCs' claims that a refusal to exclude AT&T from the market would threaten their viability, the Commission stated:

> We realize that much of the IRCs' concern stems not from any immediate threat but from the long-range possibility that data-phone-type services may ultimately prove more flexible and cost-effective than Telex or AVD for the majority of users of international data services. Although the record does not support such a conclusion, this might be a potential threat to the IRCs if it should occur. However, our statutory mandate is to regulate telecommunications such that the public receives high quality service at the lowest cost. If the IRCs cannot effectively compete with dataphone-type uses of MTS, consistent with this Order, and if the service thereby fills a public need at cost-justified rates below those which the IRCs can justify for their own service, we shall not impose a protective umbrella to assure the IRCs a portion of the market.

57 FCC 2d at 710 (J.A. 8).

These central conclusions, amply supported in the record to the extent that they require factual underpinning, are consistent with the Commission's statutory mandate to make available to the people of this country "a rapid, efficient, Nation-wide, and world-wide communications service with adequate facilities at reasonable charges . . . ." 47 U.S.C. §151. Neither the "tradition" of separating voice from record services nor the specter of economic injury to established IRCs required the Commission to give the public interest secondary consideration. The Commission's policy determination was based upon its own judgment that dataphone-type services by both AT&T and the IRCs would serve the public interest, "a judgment reached in a conscientious exercise of the discretion vested in the Commission by Congress." Washington Utilities and Transporation Commission v. FCC, supra n. 14, 513 F.2d at 1159.

THE COMMISSION ACTED REASONABLY IN CONCLUDING AS A MATTER OF POLICY TO GOVERN FUTURE APPLICATIONS, THAT AT&T MAY FURNISH DATAPHONE-TYPE SERVICES OVER EXISTING FACILITIES, IN COMPETITION WITH THE IRCs.

The petitioners present only a single substantive question that is ripe for review: whether the Commission erred in refusing to bar AT&T from the overseas data market. They do not challenge the finding of need for the service, or the conclusion that AT&T can satisfy part of that need at low cost

with its existing facilities. Their sole substantive argument appears to be that the Commission had a duty to place the IRCs' interests first and keep AT&T out of this business regardless of public interest considerations. This argument is incorrect as a matter of law and unsound as a basis for policy decisions.

A. Only the Basic Policy Decision To Permit AT&T To Provide Overseas Dataphone Service Is Ripe For Review.

In 148 pages of opening briefs, none of the petitioners attempts to show that the Commission's order is "final" and ripe for review, within the meaning of 28 U.S.C. §2342(1) and Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §704. Yet, the Commission has neither granted nor denied applications; it adopted no formal regulations; the interconnection matter remains unresolved; and applications both for certification under Section 214 and for interconnection are pending before the agency. The Court must determine as a threshold matter whether and to what extent 19/ it may review the matter in its present inchoate state. If the case is not ripe, the petitions should be dismissed.

19/ The fact that some parts of the order may be ripe for review does not open other parts not immediately involved to premature judicial scrutiny. See Regional Rail Reorganization Cases, 419 U.S. 102, 145-46 (1975); Communist Party v. S.A.C.B., 367 U.S. 1, 70-81 (1961).

The Supreme Court has found that it is "impossible to devise a formula" for determining ripeness, and that the concept has a "practical rather than technical construction." Cox Broadcasting Company v. Cohn, 420 U.S. 469 (1975). Nevertheless, "practical" tests exist to help courts decide whether review is appropriate early rather than later.

In some cases, the decision has turned on whether the orders "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." E.g., Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948). In other cases, the courts have looked to whether the order has an immediate and practical impact, so that, for example, a regulated company must comply with regulations or risk legal sanctions. 20/ One commentator has stated that a good reason for not reviewing early is a lack of a precise issue. 21/ "Concreteness" of the factual setting is another test. 22/

Perhaps the most widely accepted formulation of the test for ripeness was first stated by Mr. Justice Frankfurter in a concurring opinion in Anti-Fascist Committee v. McGrath,

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20/ E.g., Frozen Food Express v. United States, 351 U.S. 40 (1956).

21/ L. Jaffe, Judicial Control of Administrative Action (Abridged Student Edition) 407 (1965).

22/ Cf. Zemel v. Rusk, 381 U.S. 1 (1965).

341 U.S. 123, 156 (1951):

> Whether "justiciability" exists ... has most often turned on evaluating both the appropriateness of the issues for decision and the hardship of denying judicial review.

This encompasses both the precise issue or "concreteness" element and the factor of practical impact.

Whatever the wording of the test, the order here at best is reviewable only insofar as it establishes a broad policy to govern future applications. Compare Washington Utilities and Transportation Commission v. FCC, supra, 513 F.2d 1142; Network Project v. FCC, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975). The competitive harms the petitioners apparently fear can result only if the Commission grants an AT&T application -- and even then, conditions or restrictions on the grants, or resolution of the interconnection requests, might satisfy the IRCs. 57 FCC 2d at 711 (J.A. 9). Nor does the order require action or forbearance at the risk of legal sanctions. It merely determines, as a matter of policy, that AT&T is not to be excluded. 23/

23/ Just as plainly, it determines that the IRCs may furnish dataphone-type services. Just what kinds of services they may offer depends in large part on resolution of the interconnection question.

We submit, therefore, that the Court should confine its review to the basic decision not to exclude AT&T, 24/ and should not consider such matters as interconnection and the nature of services to be offered by AT&T and the IRCs. There will be ample opportunity to review those matters when and if authorizations are granted or denied and interconnection orders are entered. The Commission's action on pending applications may relieve many of the IRCs' anxieties, obviating further judicial review.

B. The Commission Gave Adequate And Conscientious Consideration To The Competition Aspect Of The Public Interest.

The IRCs argue that the Commission gave inadequate attention to competition, and that its policy should be set aside on that ground alone. This argument proceeds from two misconceptions which we shall try to dispel: (1) that competitive considerations override all other matters in determining where the public interest lies; and (2) that the

24/ The Court could reasonably decide that even the policy matter fails to present a "precise issue" in a concrete factual setting, and that review should await some further action that immediately harms the petitioners. The Commission sees some value, however, in review of the policy decision so that interested parties may conduct their affairs with some assurance that the policy will not later be set aside. We do not suggest that the Court sits to render advisory opinions; but there is ample precedent for reviewing policy decisions before their implementation. E.g., Washington Utilities and Transportation Commission, supra. Cf. New York Shipping Ass'n, Inc. v. FMC, 495 F.2d 1215, 1218-20 (2d Cir.), cert. denied, 419 U.S. 964 (1974).

only adequate safeguard when competitive problems arise is to deny altogether the authorization that is questioned.

This Court rejected the first of these premises in an earlier FCC case involving allocations of frequencies to AT&T in a manner the petitioners said was anticompetitive:

> [T]he standard of "public interest, convenience, or necessity" by which the Commission is to be guided in its actions ... comprises many other factors as well; and indeed, were the Commission to base its action solely upon the ground that competition in the industry would be favored and nothing more, we would have some doubt whether it had fulfilled its responsibility to consider other important criteria before determining whether its proposed rule is in the "public interest."

Radio Relay Corporation v. FCC, 409 F.2d 322, 326 (2d Cir. 1969). See also FCC v. RCA Communications, Inc., 346 U.S. 86 (1952); National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. ___ (1976); Hawaiian Telephone Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974).

The Radio Relay opinion is particularly instructive in this case. There, as here, the petitioners objected to a policy which would permit AT&T to enter a market in competition with them, on grounds that AT&T's great resources would enable it to compete unfairly and dominate the market. The Court found that the Commission had given due attention to this possibility and concluded that the likelihood of injury had

been overstated. It found also that the Commission's power to impose conditions to obviate abuses and its duty of surveillance over actual conduct were adequate safeguards. 409 F.2d at 327. 25/

As to the second premise, where concern about the possibility of future anticompetitive conduct arises, denial of entry is not the sole remedy. An agency may validly authorize under a "public interest" standard a transaction or activity which might have adverse competitive effects, if the agency concludes on an adequate factual foundation that the risk is outweighed by the need to promote other public interest factors entitled to equal or greater weight under the relevant statutes. See FCC v. RCA Communications, Inc., supra; cf. Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 298-99 (1974).

The Commission here weighed the IRCs' competition arguments along with other considerations, and concluded that its duty to satisfy an unmet need for communication services at the lowest cost was "overriding." 57 FCC 2d at 709 (J.A. 6). This Court approved a similar weighing of interests in Radio Relay, finding that "a highly relevant element" upon

25/ See also NARUC v. FCC, supra, 525 F.2d at 638-39, where the D.C. Circuit relied on the Commission's "duty of continual supervision" and the Justice Department's "continuing assessment" under the antitrust laws to preclude abuses.

which the Commission had relied was that the demand for service substantially exceeded the supply, "thus creating an immediate public need for expansion of the service." 409 F.2d at 326.26/

The IRCs actually appear to argue that the Commission should have kept AT&T out of the market in the interest of competitive equality alone, without regard to other factors. The D.C. Circuit has emphatically rejected that proposition in an opinion that should be familiar to the parties in this case. Noting that the Commission, in authorizing RCA Globcom to provide voice-only private line service to Hawaii, had sought to equalize competition among competitors, Judge Wilkey wrote:

> This is not the objective or role assigned by law to the Federal Communications Commission. As a result of focusing first on competitors, next on competition, and then on the public interest, the FCC has given scant attention to the question of public convenience and necessity, and therefore has not met its statutorily imposed duty.

Hawaiian Telephone Co. v. FCC, supra, 498 F.2d at 776. The Court unanimously reversed the Commission. 27/

26/ The Court also found support for the Commission in the fact that the carriers in that case had for some time been supplying the very service from which the petitioners sought to bar them -- just as AT&T has for many years offered dataphone service on the domestic network. 409 F.2d at 426.

27/ The IRCs' argument in favor of equalizing competition has another flaw. It proceeds from a comparison of gigantic AT&T with the relatively small operations of ITT Worldcom, RCA Globcom, WUI, and the other IRCs. AT&T's economic power

(Footnote continued on next page)

C. Precedent Did Not Require Rigid Adherence To The Voice/Data Dichotomy, So As To Bar AT&T From This Service.

As we demonstrated in the Counterstatement, the traditional separation between overseas voice and record carriers has never been absolute. The Commission pointed out in a 1955 order authorizing a Hawaii cable without restiction to voice communications:

> There is no provision or combination of provisions in the Act which present an absolute legal barrier to the provision of record communication service by AT&T ....

27/ (Footnote continued from previous page) obviously is great. But we do not accept the proposition that ITT Worldcom, RCA Globcom and TRT, with the vast resources at least potentially available to them from their parent conglomerate corporations, cannot compete with AT&T. Fortune Magazine's list of the 500 largest industrial corporations in 1975 includes ITT as No. 11, with sales of $11.4 billion; RCA as No. 34, with sales of $4.8 billion; and United Brands as No. 94, with sales of $2.2 billion. Fortune, May 1976. The IRCs also state repeatedly that the overseas record market now is vigorously competitive, and that the Commission should not upset that market by injecting AT&T. While there is competition in some areas, it is open to serious question whether the IRCs compete among themselves as to rates and new services. The Commission recently embarked upon an audit and study of IRC operations to answer such questions as whether the IRCs earn too high a rate of return -- a situation which would not exist in a truly competitive market. Operations Between U.S. and Foreign Points (Docket No. 20778), FCC 76-396, 59 FCC 2d ___ (1976). In a separate statement concurring in initiation of the docket, Commissioner Washburn stated:

> [T]his industry overall does not now exhibit the characteristics generally reflective of a truly competitive marketplace. A review of current tariffs reveals little if any real price competition, and service prices bear only a loose relationship to the costs incurred.

AT&T (HAW-1), 44 FCC 602, 611 (1955). Instead, "in each instance before us we must evaluate conflicting considerations and resolve them in the manner which will serve the public convenience and necessity best." Id. at 610. See also, AT&T (Alternate Voice/nonvoice services), 27 FCC at 120, where the Commission observed that exceptions to the voice/record separation "have always been made when they were found to be in the public interest."

The Commission's decision here is fully consistent with the tradition of separation, subject to exceptions where the public interest requires. The order finds that the public interest requires removal of an artificial restriction on use of the overseas MTS network, and it makes an ad hoc ruling without disturbing the traditional separation. The Commission adequately distinguished the TAT-4 decision, on which the IRCs rely principally. 28/ See Counterstatement, p. 15 n. 18. It found the unmet need for dataphone service to be "overriding." And it concluded that the public interest required departure from the tradition in this case. 57 FCC 2d at 709 (J.A. 6).

28/ The order expressly stated that it "should in no way be construed as reversing [the TAT-4] policy nor should it be interpreted so as to authorize AT&T to offer any other new services now or in the future." 57 FCC 2d at 709 (J.A. 6).

D. The Commission Had Discretion To Defer Resolution Of The Interconnection Question.

Section 4(j) of the Communications Act, 47 U.S.C. §154(j), gives the Commission broad discretion to conduct its proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This section has been interpreted to give the agency expansive powers and wide discretion to adopt flexible procedures to meet everchanging communications needs. NBC v. FCC, 319 U.S. 190 (1943). See also FCC v. Schreiber, 381 U.S. 279, 289 (1965); Nader v. FCC, 520 F.2d 182, 195-96 (D.C. Cir. 1975). This discretion permits the Commissio to control its own docket and to resolve subordinate questions of procedure, such as the scope of an inquiry. FCC v. Schreiber, supra; Nader v. FCC, supra.

In this case, the Commission set out to resolve as many of the dataphone policy questions as possible on the basis of comments. When those comments proved inadequate to settle the dispute about interconnection, the Commission properly reserved judgment on the question and invited further pleadings. Rather than defer decision on the entire policy area, the Commission resolved what it could and asked for more help on the rest. This is eminently reasonable, and cannot be grounds for reversal of the policy that has been decided to this point.

The petitioners argue that the Commission should simply have followed its established interconnection policies, 29/ and directed AT&T immediately to satisfy the IRCs' needs. This argument ignores the fact that the Commission specifically found that the public interest requires interconnection:

> We further find it to be in the public interest for the IRCs to expand their switched record services, such as Datel, and to interconnect their facilities with AT&T's domestic MTS network for this purpose.

57 FCC 2d at 709 (J.A. 7). The remaining interconnection question, therefore, is not whether but what kind. The Commission could not resolve this remaining question because it did not have enough information on the IRCs' precise needs for their proposed services. It was both reasonable and prudent to ask for more information before ordering interconnection.

In any event, the IRCs cannot demonstrate harm from severance of the interconnection question. They have pleadings before the Commission now, and the Commission has undertaken to issue appropriate orders. No authorizations have been granted to AT&T; and the Commission will consider whether

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29/ The IRCs cite Specialized Common Carrier Services, supra, and Domestic Communications-Satellite Facilities, 35 FCC 2d 844, 37 FCC 2d 184, 38 FCC 2d 665 (1972), as precedent. Those proceedings, however, involved another question: interconnection between private line facilities belonging to specialized and satellite carriers and the telephone companies' local distribution facilities.

"conditions" should be placed on any AT&T grants to achieve necessary interconnection. 57 FCC 2d at 711 (J.A. 9). The IRCs will have an opportunity to seek review of any final order disposing of their interconnection requests or granting AT&T authorizations without conditions. This Court should leave undisturbed the Commission's management of its own docket in reserving judgment on that difficult policy matter.

E. The Argument That The FCC Misconstrued The IRCs Service Proposals Is Barred By Section 405; In Any Event, The Commission's Determination That The IRCs Proposed More Specialized Service Has Substantial Support In The Record.

The IRCs argue that the order must be set aside because the Commission mistakenly assumed that their service proposals were more specialized and therefore different from AT&T's. This argument was not presented to the Commission in a petition for reconsideration and therefore is barred by Section 405, 47 U.S.C. §405. Section 405 permits parties aggrieved by Commission orders to seek redress first from the Commission by seeking rehearing. Petitions for reconsideration are not prerequisites to judicial review "except where the party seeking such review . . . relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

This Court has consistently refused to consider arguments presented in violation of Section 405, which is, in effect, a codification of the doctrine of exhaustion of administrative remedies. In Cornell University v. FCC, 427 F.2d 680, 684 (1970), the Court declined to rule on a point in the petitioner's brief because it had "failed to raise this contention before the FCC." See also Gross v. FCC, 480 F.2d 1288, 1290 & n. 5 (2d Cir. 1973), where the Court stated:

> This bar precluding judicial review of issues that the FCC has not had the initial opportunity to consider is not a mere technicality. It is grounded on sound policy reasons. 30/

The argument is without merit in any event. The Commission found that the IRCs had indicated "that they will offer a more specialized service, capable of being tailored to the needs of the subscriber." 57 FCC 2d at 709 (J.A. 6). All the IRCs had done just that. The thrust of their more specialized offering was twofold: (1) to show that AT&T could not provide adequate service with existing facilities,

30/ Compare New York State Broadcasters Ass'n v. FCC, 414 F.2d 990, 994 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970), where the Court considered an argument that a statute was unconstitutional even though the argument had not been made to the Commission. The Court did this because the Commission "either would not or could not" declare an act of Congress unconstitutional. Prior resort to the FCC thus would have been futile.

and (2) to persuade the Commission of the superiority of their own proposal.

In its Reply Comments, for example, RCA stated:

> [T]he qualified international voice/record carriers will maximize application of the latest technologies. The proof of this is the innovative type of system for the handling of switched voice/data calls proposed by RCA Globcom as compared to the AT&T proposal which would furnish nothing to data customers but a connection and a line without regard to the special needs associated with computer-to-computer data transmission.

(J.A. 348-49.) Similarly, in Reply Comments, WUI contrasted AT&T's "mixed bundles" of satellite and cable channels which "will disadvantage data subscribers," with its own proposal whereby "users would <u>know</u> whether cable or satellite routing is involved." (J.A. 381.) See also "TRT Telecommunications Corp. Required Interconnection for International Dataphone," where TRT argued that the IRCs will compete for the same market with AT&T, but conceded:

> It is true that TRT, and, we assume, the other IRCs also, are endeavoring to develop switched data transmission services which will provide the public with greater reliability and/or economics in operation than are available from AT&T's DATAPHONE ... [T]he IRCs could not hope to attract a significant number of customers unless their services were superior in some material respect to DATAPHONE. In this regard, we agree that the IRCs' offerings will probably attract a larger percentage of the more sophisticated and demanding users than DATAPHONE.

Addendum to Petitioners' Briefs, pp. 41-42. 31/

These record and post-record statements of the IRCs are consistent with the Commission's finding. Even if the Court considers this tardy argument, it should rule that the Commission's finding has ample support in the record and should be affirmed.

F. The Commission's Procedures Were Appropriate For Broad Policy Making.

The Commission did not adjudicate here. It made policy. This Court has consistently held that notice and comment procedures -- the kind the Commission applied -- are appropriate for making policy. Thus, in a case involving presunrise broadcast policies with broad application to an entire industry, the Court held:

> [W]hen, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

31/ As additional examples of record support for its finding, the Commission calls the following pages to the Court's attention: J.A. 163, 165, 201, 209, 218, 225-27, 234, 261, 288, 300, 317, 325, 332, 339-40, 344-46, 368-69, 379, 383, 398 n.**, 417. For post-record statements consistent with the Commission's finding, see Addendum to Petitioners' Briefs, pp. 16, 20, 41-42, 160.

WBEN, Inc. v. FCC, 396 F.2d at 618. 32/

In this case, the Commission decided to adopt new policies for overseas dataphone "in the context of this inquiry rather than in passing on separate applications by the carriers to provide such service." 36 FCC 2d at 608 (J.A. 14). This followed the precedent of Specialized Common Carrier Services, supra; and Domestic Communications-Satellite Facilities, supra. That precedent has express judicial approval. WBEN, Inc. v. FCC, supra; Washington Utilities and Transportation Commission v. FCC, supra, 513 F.2d at 1160-65. The Court should find no error in the Commission's procedure.

CONCLUSION

The Commission has a duty to make available to the nation's citizens a rapid and efficient worldwide communications service. 47 U.S.C. §151. An unsatisfied need for overseas service was called to its attention. After appropriate procedures, it adopted the policy outlined above

32/ This Court went so far in one case as to hold that rule making was mandatory, where it found that the agency had altered broad policy in ad hoc adjudication. Bell Aerospace Co. v. NLRB, 475 F.2d 485 (1973). The Supreme Court reversed, adhering to the rule that agencies have discretion to proceed either through adjudication or rule making. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). But the use of rule making procedures for substantive policy changes remains at least an option for agencies, if not an expressly preferred option.

as its answer to the unsatisfied demand. There can be no certainty that the policy will succeed.

> Planning necessarily rests upon the acceptance of uncertain forecasts of future events. No other course is possible if the Commission is to formulate regulatory practices and policies that will enable the industry to satisfy future public needs.

Washington Utilities and Transportation Commission, 513 F.2d at 1160. Cf. GTE Service Corp. v. FCC, 474 F.2d 724, 731 (2d Cir. 1973).

The Commission's action "is based upon experience as well as upon deliberate and thorough investigation." Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 484 (2d Cir. 1970). Although there may be different opinions as to the wisdom of its policy, it is not the Court's function to weigh the evidence in support of these various points of view. The Court should not substitute its judgment for that of the Commission. Id. at 481-82; Cornell University v. FCC, 427 F.2d at 683. The Court should affirm.

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A D D E N D U M

47 U.S.C. §151

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. §154(i), (j)

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

47 U.S.C. §214

SEC. 214. (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this Act: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of the Army,[22] the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After

issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall forfeit to the United States $100 for each day during which such refusal or neglect continues.[33]

47 U.S.C. §405

SEC. 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for re-

hearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5 (d) (1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402 (b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.[58]